

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-405 Cr.

GEORGE H. LUSTIG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**SUPPLEMENTAL BRIEF OF INTERVENING AUTHORITY
PURSUANT TO SUPREME COURT RULE 24 § 55 IN
SUPPORT OF PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH
CIRCUIT**

PHILLIP P. WEIDNER
DRATHMAN, WEIDNER & BRYSON
333 W. Fourth Avenue
Suite 35
Anchorage, Alaska 99501
(907) 276-7000
Attorney for Petitioner

October __, 1977

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PHILLIP P. WEIDNER
DRATHMAN, WEIDNER & BRYSON
333 W. Fourth Avenue
Suite 35
Anchorage, Alaska 99501
(907) 276-7000
Attorney for Petitioner

October ²⁸—, 1977

COMES NOW, the Petitioner, GEORGE H. LUSTIG, by and through his attorney, PHILLIP P. WEIDNER, of DRATHMAN, WEIDNER & BRYSON, 333 W. Fourth Avenue, Suite 35, Anchorage, Alaska 99501, Phone (907) 276-7000, and hereby gives notice, pursuant to Rule 24 § 5 of the Supreme Court Rules of Appellant Procedure, that he relies on the following intervening cases that support his position that this Court should grant certiorari on the issue of

“Whether the Warrantless Search of an Opaque Parcel Seized from Mr. Lustig’s Vehicle Absent Probable Cause or the Necessity for an Inventory Search, Violated The Rights to Privacy and Freedom From Illegal Search and Seizure, Under the United States and Alaska Constitutions, *United States v. Chadwick*, 97 S.Ct. 2476 45 S.W. 4798 (6/21/77), and *South Dakota v. Opperman*, 428 U.S. 364 (1976), Where the Search Occurred at Police Headquarters?” (Petition of George H. Lustig in No. 77-405 at pg. 1-2).

I. THE ALASKA SUPREME COURT’S LATEST DECISION ON INVENTORY SEARCHES CONFLICTS WITH THE NINTH CIRCUIT HOLDING ON ALASKAN LAW.

The Court’s attention is directed to the decision of the Supreme Court for the State of Alaska in *Timothy Zehrung, Appellant, v. State of Alaska, Appellee*, P.2d , File No. 2823, Slip Op. No. 1501, September 30, 1977, in which the Court specifically held that a “standard procedure” inventory search pursuant to an arrest violated the Alaska Constitution where there was no need for incarceration.

“The Court in *Dixon* stated that *because the justifications for a preincarceration inventory¹⁰ do not exist if the arrestee is not to be incarcerated, no inventory search can be conducted in such cases.*¹¹ We agree. We recognize that such a decision necessitates invalidating the standard procedure at the jail. The current practice at the jail is to conduct an inventory search of all arrestees, whether or not

a particular arrestee is capable of posting bail at the time he or she arrives at the jail.¹² Nevertheless, we hold that a warrantless jailhouse inventory is without justification when an arrestee is not going to be incarcerated, and it is therefore constitutionally impermissible.

¹⁰These justifications are to prevent the entry of money, contraband and weapons into the jail, to protect the arrestee's property, and to protect the jail against arrestee claims for lost or damaged property. *State v. Kaluna*, 520 P.2d 51, 60-61 (Hawaii 1974). In connection with this, see Note, The Inventory Search of an Offender Arrested for a Minor Traffic Violations: Its Scope and Constitutional Requirements, 53 B.U.L. Rev. 858, 864 (1973).

¹¹222 N.W. 3d at 756.

¹²We do not pass on whether fingerprinting and photographing an arrestee is justified where the arrestee is to be released on bail. In any event, this does not give rise to a justification for an inventory search. (*Zehring*, *supra*, Slip, Op. No. 1501 at pg. 7-8; E.A.)

The Petitioner Lustig, likewise submits, that it was a violation of his constitutional rights, and a misinterpretation of Alaska Law, for the Ninth Circuit Court of Appeals to hold that the warrantless seizure of the opaque package from his automobile, and the warrantless search of the parcel at police headquarters, absent probable cause or the necessity for an impoundment of the automobile, was a valid inventory search under Alaska law.

II. THE MINNESOTA SUPREME COURT HAS SPECIFICALLY ADOPTED THE POSITION THAT INVENTORY SEARCHES ARE CONTROLLED BY THE "NECESSITY" DOCTRINE ADVANCED BY THE PETITIONER LUSTIG'

Further, the position of the Petitioner is supported by the holding of the Supreme Court of the State of Minnesota in *State v. Goodrich*, (Minn. 7/15/77) appearing at 21 Cr.L.Rptr. 1077 (August 24, 1977). In *Goodrich*, *supra*, The Court held

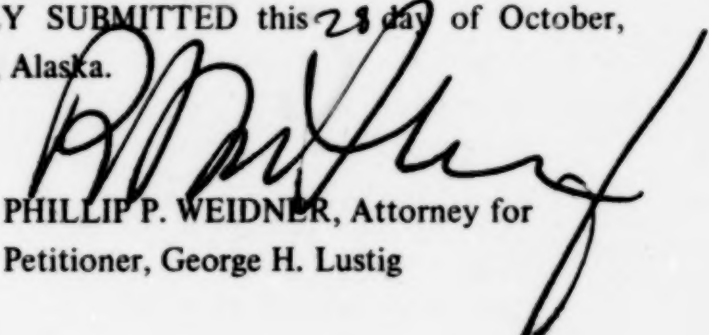
that LSD and amphetamines that were found pursuant to an "inventory search" were inadmissible in a later controlled substances prosecution, since the Officers had no right to impound a DWI arrestee's car where other arrangements to have the automobile picked up for safe keeping had been made.

The record in the instant proceeding demonstrates clearly that Mr. Lustig was vehemently demanding that he be allowed to exercise his rights under the Alaska Administrative Code to have his automobile removed by his friends on the scene, such that the case is on all fours with Goodrich, supra, and the decision conflicts with the holding in Zehring, supra.

III. SUMMARY AND CONCLUSIONS.

This Court should grant certiorari to, 1) Rectify the erroneous decision of the Ninth Circuit as to Alaskan law on inventory searches, and 2) Rule clearly that *South Dakota v. Opperman*, 428 U.S. 364 (1976) and *U.S. v. Chadwick*, *supra*, cannot be misconstrued to authorize the search of an opaque parcel from a vehicle seized at an arrest, absent the necessity of impoundment, when in fact the arrestee is able to "make other arrangements for the safe keeping of his belongings" pursuant to State procedural rights.

RESPECTFULLY SUBMITTED this 23 day of October, 1977, at Anchorage, Alaska.


PHILLIP P. WEIDNER, Attorney for
Petitioner, George H. Lustig

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 21(1), Rule 33(1), Rule 33(2) (1), and Rule 33(3) (b), of the Supreme Court Rules of Appellate Procedure, that I am a member of the Bar of the U.S. Supreme Court in good standing, and that three copies of the foregoing Supplemental Brief of Intervening Authority Pursuant to Supreme Court Rule 24 § 55 in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were served upon counsel for the Respondent by depositing the same in the United States mail at Anchorage, Alaska, postage pre-paid, addressed to:

Mr. G. Kent Edwards
United States Attorney
605 W. Fourth Avenue
Anchorage, Alaska 99501

and further, that three copies of the foregoing document were served upon the Solicitor General of the United States by depositing the same in the United States mail, at Anchorage, Alaska, postage pre-paid, addressed to:

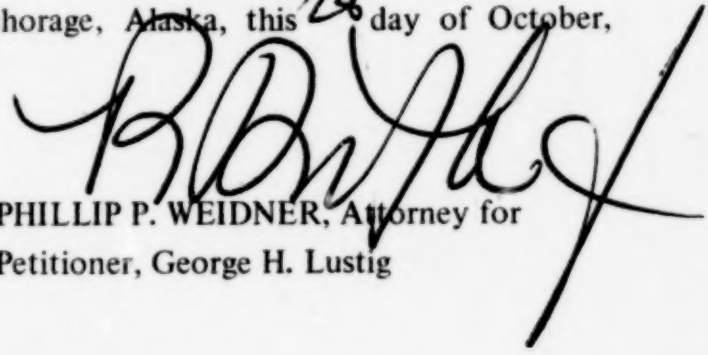
Solicitor General
Department of Justice
Washington, D.C. 20530

and further, that three copies of the foregoing document were served upon counsel for both co-defendants in the instant proceedings below, by depositing the same in the United States mail at Anchorage, Alaska, postage pre-paid, addressed to:

Mr. F. P. Pettyjohn
631 "I" Street
Anchorage, Alaska 99501
Attorney for George D.
Pederson

George L. Schraer
2715 Hillegass Avenue, #4
Berkeley, California 94705
Attorney for Cheryl Rae
Pederson

DATED at Anchorage, Alaska, this ²⁹ day of October, 1977.


PHILLIP P. WEIDNER, Attorney for
Petitioner, George H. Lustig